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Supreme Court, U.S.
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No. 94-288

In The

Supreme Court of the United States

October Term, 1994

WILLIAM GASKO and MARIE GASKO

Petitioners,

v.

GAF CORPORATION

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners in a personal injury case can petition the U. S. Supreme Court for a writ of certiorari following two jury trials in the Superior Court of New Jersey, the first of which resulted in a new trial being ordered and the second of which resulted in a verdict in favor of the defendants dismissing the case, which dismissal was affirmed following petitioners' appeal by the Appellate Division of the Superior Court of New Jersey, and which petition for certification to the New Jersey Supreme Court was denied.

2. Whether the petition for certiorari of a personal injury case involves special and important reasons and deals with federal law or questions which would warrant the Court in its discretion to grant a writ of certiorari.

LIST OF PARTIES TO THE PROCEEDING

Petitioners William Gasko and Marie Gasko were plaintiffs in the Superior Court of New Jersey, Law Division and appealed to the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court.

The only remaining defendant in the case was respondent GAF Corporation which has no parent company nor any non-wholly owned subsidiaries to list pursuant to this Court's Rule 29.1.

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To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

RESPONDENT GAF CORPORATION RESPECTFULLY REQUESTS THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED.

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division denying the Gaskos' appeal and the order of the New Jersey Supreme Court denying the Gaskos' petition for certification are set forth in the Appendix.

STATEMENT OF JURISDICTION

There is no basis for jurisdiction by the Supreme Court of the United States in the within matter as the petitioners do not qualify for a writ of certiorari pursuant to 28 USC 1257(a) as alleged in their brief.

STATEMENT OF THE CASE

Petitioners William and Marie Gasko originally brought an action as plaintiffs in the Superior Court of New Jersey for personal injuries and damages against the defendants alleging that plaintiff William Gasko sustained asbestos-related colon cancer due to the liability and negligence of the defendants.

The first trial was conducted in April, 1988. William Gasko was awarded $500,000.00 and his wife, Marie Gasko, was awarded $200,000.00 on her per quod claim. Petitioners rejected the trial judge's remittitur of $200,000.00 and $20,000.00 for William and Marie Gasko respectively and a new trial was ordered (A-1-2).

The new or second trial began on December 2, 1992. At that time, Susan Daum, M. D., testified as plaintiff's medical expert and relied on epidemiological studies to support her opinion that plaintiff's colon cancer was proximately caused by asbestos exposure (A-2-3).

J. Bernard L. Gee, M. D. then testified on behalf of the defendants that plaintiff's colon cancer was not proximately caused by asbestos exposure. The jury believed the defense expert and found that the plaintiff had not

established proximate cause on the part of the defendants. Therefore, the complaint was dismissed by order of December 18, 1992. The plaintiff's motion for a new trial was denied by order of January 8, 1993 (A-3).

The plaintiffs appealed the adverse jury verdict to the Appellate Division of the New Jersey Superior Court and this appeal was denied. The Appellate Division succinctly summarized the case involved by holding that the case involved a battle of the experts and the jury was free to decide which expert was more persuasive (A-3).

The plaintiffs filed a petition for certification to the New Jersey Supreme Court which was denied on March 8, 1994 (A-4). They now petition the U. S. Supreme Court for a writ of certiorari.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Case And The Petition For Certiorari Should Be Dismissed.

Petitioners allege that 28 USC 1257(a) confers jurisdiction on the U. S. Supreme Court to review the decisions below of both the Supreme Court and Appellate Division of the State of New Jersey.

However, 28 USC 1257(a) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of

> any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

In the case at bar, petitioners had not one but two jury trials pursuant to their constitutional rights, contrary to the allegations on page 6 of the brief that "constitutional provisions are involved" with regard to their right to a jury trial.

In the first trial, the plaintiffs refused to accept a remittitur and a new trial was ordered. The new or second trial resulted in an adverse verdict and their case was dismissed. Their appeal to the Appellate Division of the Superior Court of New Jersey was denied as was their petition for certification to the New Jersey Supreme Court (A-4).

Certainly the petitioners in appealing an adverse verdict in a personal injury case provided no "special reasons" to the N. J. Supreme Court as is required by New Jersey Court Rule 2:12-4 in seeking certification of a final judgment of the Appellate Division.

On the contrary, the petitioners simply disagreed with the outcome of their case. However, they exhausted their remedies and the matter was adjudicated with finality in the state courts of New Jersey. Moreover, a review of the language of 28 USC 1257(a) *infra*, clearly demonstrates that the U. S. Supreme Court lacks jurisdiction over the within matter.

II. The Petitioners Have Not Met the Considerations Governing Review on Writ of Certiorari Set Forth in U.S. Supr. Ct. R.10.

U. S. Supr. Ct. R.10 states *inter alia* that a petition for writ of certiorari is not a matter of right but of judicial discretion which will be granted only when there are special and important reasons therefore. These reasons invariably involve important federal law and federal questions.

In *Braxton v. U. S.*, 114 L.Ed.2d 385, 111 S.Ct. 1854, 1857 (1991) the Supreme Court held:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the Circuit Courts of Appeals and state courts covering the meaning of provisions of federal law. See this Court's Rule 10.1.

In the case at bar no federal questions or important issues of federal law are presented. The petitioners are simply dissatisfied with the outcome of a state court jury verdict in a personal injury case in which the jury decided against them. Plaintiffs having exhausted the appellate process at the highest level in the state court, the matter has been adjudicated with finality and no special or important reasons are present to warrant a writ of certiorari to the U. S. Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Gaskos' Petition for a Writ of Certiorari.

Respectfully submitted,

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-2963-91T1

WILLIAM GASKO and MARIE GASKO
Plaintiffs-Appellants,

v.

CELOTEX CORPORATION, FLEXITALLIC GASKETS, INC. and, RUBBEROID CO., DIVISION OF G.A.F.,

Defendants-Respondents.

Submitted December 6, 1993 – Decided

Before Judges J. H. Coleman and Thomas.

On appeal from Superior Court, Law Division, Middlesex County.

Appellants filed a *pro se* brief.

Picillo, Bromberg and Caruso, attorneys for respondent G.A.F. Corp. (Arthur D. Bromberg, of counsel; Gary Van Lieu, on the brief).

PER CURIAM

This is an appeal by plaintiff William Gasko and his wife from an adverse jury verdict denying plaintiff's claim of asbestos-related colon cancer. We affirm.

This appeal follows a second trial. The first trial was conducted in April 1988 and resulted in a jury verdict of $500,000 for plaintiff and $200,000 for his wife, Marie Gasko. Defendants' motion for a new trial, or in the

alternative, a remittitur, was granted. The trial judge ordered a remittitur in the amount of $200,000 for plaintiff and $20,000 for his wife, or in the alternative a new trial on all issues. Plaintiffs rejected the remittitur and a new trial ensued.

Prior to commencement of the new trial, however, defendants moved for summary judgment, contending that plaintiff's proof of medical causation was legally insufficient. The judge found that plaintiff's epidemiological evidence, to be presented by Dr. Susan Daum, was inadmissible. The judge granted the motion and we reversed that summary judgment in *Grassis v. Johns-Manville Corp.*, 248 *N.J. Super.* 446, 458 (App. Div. 1991). *Grassis* was decided May 30, 1991, and the Gasko retrial was scheduled to begin on April 27, 1992. One of the defendants requested an adjournment until after the Supreme Court rendered its decision in *Landrigan v. Celotex Corp.*, which also dealt with the admission of epidemiological studies in colon cancer cases. *Landrigan, supra,* 127 *N.J.* 404 (1992), was decided May 6, 1992. The Gasko trial was then rescheduled to commence on September 28, 1992, but adjourned to November 2, and then to December 2, 1992.

A jury trial was conducted beginning December 2, 1992. Dr. Susan Daum testified for plaintiff, and she relied upon epidemiological studies to support her opinion that plaintiff's colon cancer was proximately caused by asbestos exposure. The defense presented the testimony of Dr. J. Bernard L. Gee, who testified that plaintiff's colon cancer was not proximately caused by asbestos exposure. After deliberating a brief period, the jury found that plaintiff had not established proximate

cause. The complaint was dismissed by order dated December 18, 1992, and plaintiffs' motion for a new trial was denied in an order dated January 8, 1993.

We have considered the issues raised in plaintiffs' pro se brief in light of the record and find they are clearly without merit. R. 2:11-3(e) (1) (B), (C) and (E). The case essentially involved a battle between the experts, and the jury was free to decide which expert was more persuasive.

The issues raised concerning adjournments and delays in prosecuting the second trial were discretionary with the trial court. Although plaintiff was unable to eventually produce the live testimony of Lewis Ruppert respecting whose asbestos was contained in materials used at plaintiff's job site on certain dates, the trial judge overcame any prejudice to plaintiff by allowing plaintiff to read Ruppert's prior testimony to the jury. Furthermore, some of the delay was caused by plaintiff's inability to produce Dr. Daum earlier. Finally, the charge did not contain error.

The order denying the motion for a new trial and the judgment dismissing the complaint are affirmed.

I hereby certify that
the foregoing is a
true copy of the
original on file in
my office.
Clerk

SUPREME COURT OF
NEW JERSEY
C-666 September Term 1993
38,007

WILLIAM GASKO, et al.,

Plaintiffs-Petitioners,

v. ON PETITION FOR
CERTIFICATION

CELOTEX CORPORATION, et al.,

Defendants-Respondents

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2963-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 8th day of March, 1994.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY